IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1044 of 2000
With
CRIMINAL APPEAL No. 873 of 2000
With
CRIMINAL APPEAL No. 874 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the Judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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Criminal Appeal No.1044 of 2000:

Appellant: JAYANTILAL CHHANABHAI BHAVSAR
Versus
Respondent: STATE OF GUJARAT

With

Criminal Appeal No.873 of 2000:

Appellant: STATE OF GUJARAT
Versus
Respondent: JAYANTILAL CHHANABHAI BHAVSAR

With

Criminal Appeal No.874 of 2000:

Appellant: STATE OF GUJARAT
Versus
Respondent: DIPAK JAYANTILAL BHAVSAR

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Appearance :

MR BS SUPEHIA	Advocate for Appellant in Criminal Appeal No.1044 of 2000; Respondent in Criminal Appeal No.873 of 2000 & Respondent in Criminal Appeal No.874 of 2000..
MR KT DAVE	APP for Respondent-State in Criminal Appeal No.1044 of 2000 & Appellant-State in Criminal Appeal Nos.873 & 874 of 2000.

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 16/01/2006
COMMON ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

Criminal Appeal No.1044 of 2000 filed under Section 374(2) of the Code of Criminal Procedure, 1973 ("the Code" for short) is directed against judgment dated June 22, 2000 rendered by the learned Special Judge, Valsad at Navsari, in Special NDPS Case No.25 of 1998 by which the appellant, who was original accused No.1, has been convicted for commission of offences punishable under Sections 20(b), 22 and 21 of the Narcotics Drugs & Psychotropic Substances Act, 1985 ("the Act" for short) and sentenced to R.I. for ten years and fine of Rs.2 Lakhs, in default, R.I. for two years, for commission of offence punishable under Section 20(b) of the Act as well as R.I. for ten years and fine of Rs.2 Lakhs, in default, R.I. for two years, for commission of offence punishable under Section 22 of the Act. No sentence is imposed on the appellant for commission of offence punishable under Section 21 of the Act. The learned Judge has further directed that benefit of set off be given to the appellant and that substantive sentences shall run concurrently.

Criminal Appeal No.873 of 2000 is filed by the

State of Gujarat under Section 377 of the Code against the sentence imposed on the appellant in Criminal Appeal No.1044 of 2000 and a prayer is made to enhance the sentence as, according to the State of Gujarat, the sentence imposed is inadequate.

Criminal Appeal No.874 of 2000 filed by the State of Gujarat under Section 378 of the Code is directed against judgment dated June 22, 2000 rendered in Special NDPS Case No.25 of 1998 by which original accused No.2, i.e. Dipakkumar Jayantilal Bhavsar, is acquitted of the offences punishable under Sections 20(b), 22 & 21 of the Act.

As all the three appeals arise of common judgment dated June 22, 2000 rendered by the learned Special Judge, Valsad at Navsari, in Special NDPS Case No.25 of 1998, this Court proposes to dispose them of by this common judgment.

2. The facts emerging from the record of the case are as under:

In the month of January 1998, Mr.J.G.Mehta was discharging duties as Police Inspector, L.C.B., Valsad. On January 1, 1998, he was on patrolling duty and while

patrolling, he had come to Bhilad. At Bhilad, he received an information from his informant that in the shop named 'Arvind D. Shah Machinery', a person named Jayantilal Bhavsar, who had applied plaster on his left hand, was dealing in *ganja* and *charas.* On receipt of the information, PI Mr.Mehta verified the place and went to Umbergaon Police Station. Anticipating that services of a gazetted officer might be needed, he addressed a *yadi* to Medical Officer Mr.Bhagwatiprasad Ramdayal Mittal, mentioning, *inter alia,* the information, which was received by him and requested Dr.Mittal to come to the Police Station as it was decided to search the shop occupied by Jayantilal. On receipt of the intimation sent by PI Mr.Mehta, the Medical Officer went to Police Station. PI Mr.Mehta also conveyed the information received by him to Mr.Bharatkumar D. Vaishnav, who was then PSI of Umbergaon Police Station. It was late in night and, therefore, it was difficult to obtain warrant to carry out search in the shop. Therefore, a resolution was prepared by PI Mr.Mehta as required by proviso to sub-section (1) of Section 42 of the Act. PSI Mr.Vaishnav deputed Police Constable Mr.Bhaskar Sajjan to requisition the services of two panch witnesses. Accordingly, two persons, i.e. (1) Maheshkumar Manilal Patel and (2) Naresh Ratilal Shah, were summoned. PSI Mr.Vaishnav ascertained from them as to whether they were willing to

act as panch witnesses and on willingness being expressed by the two persons summoned by the Police Constable, they were also conveyed the information received by PI Mr.Mehta. Before leaving for the shop, PI Mr.Mehta made necessary entries at the Police Station and reduced the information received by him in writing and also drew first part of the panchnama. Thereafter, all proceeded to the shop indicated in the information in a government vehicle. After alighting from the vehicle, PI Mr.Mehta in the company of the Medical Officer and PSI Mr.Vaishnav as well as panch-witnesses entered the shop in question. Therein, the appellant and his son, who is acquitted, were found physically present. PI Mr.Mehta introduced himself to the appellant and his son and informed them about the secret information received by him. PI Mr.Mehta also informed the appellant that in view of the secret information received by him, it was necessary to search the shop and offered to search the shop in presence of a gazetted officer. The appellant expressed his desire that the shop be searched in presence of a gazetted officer. Therefore, he was informed that Medical Officer Mr.Bhagwatiprasad R. Mittal was a gazetted officer and search could take place in his presence. As the appellant agreed that the shop be searched in presence of Medical Officer Mr.Mittal, the shop was searched. PI Mr.Mehta asked the appellant and his son as to where the

contraband substances were kept. Thereupon, the appellant pointed out three tins, from which *charas* and *ganja* were found. In order to ascertain the nature of substances found, PI Mr.Mehta requisitioned services of Scientific Officer Mr.Madhusudan Pathak, who was then serving in Forensic Science Laboratory. Mr.Pathak came to the spot and after conducting certain tests opined that substances found from the shop were *ganja* and *charas* within the meaning of the Act. Police Constable Hansraj Upadhyay of L.C.B. was deputed to summon a businessman to weigh the substances found from the shop. Accordingly, one businessman named Bhurabhai Gamnaji Chaudhary was summoned. He came with scale and weights. On weighing the substances, it was found that weight of *ganja* was 4 Kilograms and 100 Grams whereas weight of *charas* was found to be 6 Kilograms and 600 Grams. PI Mr.Mehta demanded pass or permit authorizing the appellant and his son to possess *ganja* and *charas,* but none could be produced. PI Mr.Mehta in the presence of panch-witnesses and Medical Officer drew the samples. The samples were sealed as required by law. On instructions of PI Mr.Mehta, PSI Mr.Vaishnav lodged the complaint. The complaint of Mr.Vaishnav, panchnama, *muddamal,* etc. were handed over to Mr.Khernar, who was then Senior Police Station Officer of Umbergaon Police Station. The Police Station Officer of Umbergaon Police Station handed over

the *muddamal* to Writer Head Constable Mr.Bhagwanbhai for safe custody. The *muddamal* was delivered to Forensic Science Laboratory intact for analysis. The report of the analysis indicated that the substances analysed were *ganja* and *charas* respectively within the meaning of the Act. The complaint lodged by PSI Mr.Vaishnav was handed over for investigation to Mr.Kirtikumar Manchhabhai Chaudhary, who was then Police Inspector of Vapi Police Station. The Investigating Officer recorded statements of those persons who were found to be conversant with the facts of the case. On completion of the investigation, the appellant and his son were chargesheeted in the Court of learned Special Judge, Valsad at Navsari, on the basis of which, Special NDPS Case No.25 of 1998 was registered.

3. The learned Special Judge framed necessary charge against the appellant and his son at Exh.5. It was read over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (1) Dr.Bhagwatiprasad Ramdayal Mittal as P.W.-1 at Exh.10; (2) panch Maheshbhai Manilal as P.W.-2 at Exh.23; (3) Senior Police Sub Inspector Mr.Bharatkumar Dayaramdas Vaishnav as P.W.-3 at Exh.24; (4) Senior Police Station Officer of Umbergaon Police Station Mr.Hemrat Ramdas Khernar as P.W.-4 at Exh.26; (5) Writer Head Constable Mr.Bhagwanbhai Bhaylubhai as P.W.-5

at Exh.28; (6) Police Inspector Mr.Jaishanker Ganpatram Mehta as P.W.-6 at Exh.30; (7) Scientific Expert Mr.Bipin Durlabhji Davda as P.W.-7 at Exh.38; (8) Scientific Officer Mr.Madhusudan Manuprasad Pathak as P.W.-8 at Ex.41; and, (9) Investigating Officer Mr.Kirtikumar Manchhabhai Chaudhary as P.W.-9 at Exh.42, to prove its case against the appellant and his son. The prosecution also produced documentary evidence such as panchnama of search of shop and find of *ganja* and *charas* weighing 4 Kilograms & 100 Grams and 6 Kilograms & 600 Grams respectively as well as seizure of the same at Exh.12; intimation dated January 1, 1998 sent by PI Mr.J.G.Mehta to Medical Officer Mr.Mittal requesting him to come to the Police Station as search was to be arranged at Exh.13; complaint lodged by Senior Police Sub Inspector Mr.Vaishnav at Exh.25; copy of seizure memo served on the appellant and his son at Exh.33; visitation report by expert of Forensic Science Laboratory at Exh.34; certificate by businessman Mr.Bhurabhai Gamnaji Chaudhary stating that he had weighed the substances found from the shop and that weight of *ganja* was 4 Kilograms & 100 Grams and weight of *charas* was found to be 6 Kilograms & 600 Grams at Mark-A; report of analysis forwarded by Forensic Science Laboratory at Exh.40, etc. in support of its case against the appellant and his son.

4. After recording of evidence of prosecution

witnesses was over, the learned Special Judge explained to the appellant and his son the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code. In his further statement, the appellant claimed that when he was returning home on January 1, 1998 with his son Dipak after completing service, he was intercepted at Bhilad Market by the Police and taken to open shop of one Arvind D. Shah and on *otta* of the shop, light bill, telephone bill, ration card, etc. were called for from his house, but he was innocent and a false case was foisted upon him. The original accused No.2, i.e. Dipak Jayantilal, claimed in his statement that on January 1, 1998, he had gone to the shop of his father to call him and when he was passing through the market, he was arrested by the Police at about 8.00 P.M. and brought to *otta* of the open shop of Arvind D. Shah where light bill, telephone bill, etc., which were not belonging to the shop, were called for from his house and a false case was foisted upon him. However, neither the appellant nor his son led any evidence in support of the claim advanced in further statements.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that the

substances found from the shop were narcotic drug and psychotropic substance respectively within the meaning of the Act. The learned Judge considered the testimony of witnesses examined in the case and held that it was proved by the prosecution that mandatory provisions of Sections 42 and 50 of the Act were complied with. The learned Judge further held that it was proved by the prosecution that the appellant was in possession of the shop from which contraband substances were found, but it was not proved by the prosecution that the original accused No.2, i.e. son of the appellant, was also in possession of the shop from which contraband substances were found. In view of these findings, the learned Judge held that the appellant was liable to be convicted for commission of offences punishable under Sections 20(b), 21 and 22 of the Act. The learned Judge thereafter heard the appellant and the learned Public Prosecutor on the question of sentence to be imposed on the appellant. The learned Judge noticed that the appellant, at the time of rendering judgment, was 60 years old and was found to have committed offences when he was in fourth stage of his life. In view of this, the learned Judge was of the view that no case is made out by the prosecution to impose more sentence than the minimum prescribed under the Act. In ultimate result, the learned Judge has convicted the appellant under Sections 20(b), 21 and 22

of the Act and imposed sentences referred to earlier on the appellant and acquitted the original accused No.2 by judgment dated June 22, 2000 giving rise to abovenumbered three appeals.

6. This Court has heard Mr.B.S.Supehia, learned counsel of the appellant as well as respondent in Criminal Appeal No.873 of 2000 and the respondent in Criminal Appeal No.874 of 2000, and Mr.K.T.Dave, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

7. The plea that PI Mr.Mehta committed breach of provisions of Sections 42 of the Act by not making report as required by subsection (2) of Section 42 to his immediate official superior and, therefore, the judgment impugned in the appeal should be set aside, is devoid of merits. PI Mr.Jaishanker Ganpatram Mehta is a gazetted officer. He is also an empowered officer under Section 41 subsection (2) of the Act, in view of Notification No.GH-L.14-NDS-1087(i)-M-dated 15th June 1987, issued by the Government of Gujarat in exercise of powers conferred by

subsection (2) of Section 41 of the Act. As Mr.Mehta was a gazetted officer as well as an empowered officer, he was required to follow the provisions of Section 41(2) of the Act and not the provisions of Section 42 of the Act. The distinction between the provisions of Section 41(2) and Section 42 of the Act has been well explained by the Supreme Court in **M.Prabhulal vs. Assistant Director, Directorate of Revenue Intelligence, (2003) 8 SCC 449,** and by this Court in two reported decisions rendered in (1) **Ravishankar Bhagwatiprasad Mishra vs. State of Gujarat, 2000 (1) G.L.R. 137** and **(2) Abdul Salam Yusufbhai Shaikh vs. State of Gujarat, (2003) 2 G.L.R. 1643**. In **M.Prabhulal (supra),** the Supreme Court has held that it is clear from Section 41(2) of the Act that the Central Government or State Government, as the case may be, can only empower an officer of a gazetted rank who can either himself act or authorize his subordinate on the terms stated in the Section. According to the Supreme Court, under subsection (1) Section 42 of the Act, however, there is no restriction on the Central Government or the State Government to empower only a Gazetted Officer, but on an officer empowered under sub-section (1) of Section 42, there are additional checks and balances as provided in the proviso and also provided in subsection (2) of Section 42. What is laid down as a principle of law authoritatively by the Supreme Court is

that it is clear from the language of subsection (2) of Section 42 that it applies to an officer contemplated by sub-section (1) thereof and not to a Gazetted Officer contemplated by subsection (2) of Section Section 41, when such a Gazetted Officer himself makes an arrest or conducts search and seizure. Again, this Court, in above quoted two decisions, has held that when a gazetted officer, who is empowered under Section 41(2) of the Act, searches and seizes contraband substances, provisions of Section 41(2) of the Act would be applicable and not the provisions of Section 42 of the Act.

In view of this state of affairs, the contention that the provisions of Section 42 of the Act were not complied with by PI Mr.Mehta and, therefore, the judgment impugned in the appeals should be reversed, cannot be accepted. Section 41(2), *inter alia,* requires that when a gazetted officer, who is also empowered, receives information about commission of offences punishable under the Act, he has to reduce the same into writing. The record shows that on receipt of the information, it was decided by Mr.Mehta to arrange a search. In anticipation that services of a gazetted officer might be required, he had addressed an intimation to Medical Officer Mr.Mittal. In the intimation itself, the secret information received by him was stated. The intimation was the first in point

of time wherein the information received by Mr.Mehta was mentioned in writing by him. Again, PI Mr.Mehta before leaving for the shop indicated in the information had drawn first part of panchnama at Umbergaon Police Station. In the panchnama also, the information received by him was mentioned. The record further shows that before leaving for the shop mentioned in the information, PI Mr.Mehta had also made necessary entry in the Station Diary maintained at the Police Station in his own handwriting wherein the information was mentioned. The said entry has been produced by the prosecution at Exh.32. It may be stated that Exh.32 does not form part of the paper-book and, therefore, this Court has perused the original record of the case to ascertain as to what was stated in Exh.32. As noticed earlier, a bare reading of Exh.32 makes it very clear that the information received by PI Mr.Mehta was reduced into writing by him. Thus, before carrying out search and seizure of contraband items from the shop, which was found in possession of the appellant, the information was reduced into writing by Mr.Mehta. It is well to remember that neither the Act nor the Rules framed thereunder prescribe any specific mode in which the information has to be reduced into writing. On the facts and in the circumstances of the case, it will have to be held that the information was reduced into writing by PI Mr.Mehta

as required by Section 41(2) of the Act. The record fully establishes that the provisions of Section 41(2) of the Act were complied with by PI Mr.Mehta. Therefore, the first contention raised by the learned counsel of the appellant that the provisions of Section 42 of the Act were not complied with by PI Mr.Mehta and, therefore, the appeal should be accepted, has no substance, and is hereby rejected.

8. The second contention raised by the learned counsel of the appellant that a false case was foisted upon the appellant and, therefore, he should be acquitted is devoid of merits. The claim made by the original accused No.2 in his further statement would indicate that on January 1, 1998, he was going to the shop to call his father. The appellant has claimed in his further statement that he was returning home after attending his services. The appellant could not specify as to where he was serving. On the contrary, the statement made by his son would indicate that he was present in the shop. As indicated in the panchnama and the complaint, a telephone, which was registered in the name of son of the appellant, was found in the shop. The appellant could not even remotely suggest to any of the prosecution witnesses that PI Mr.Mehta was on inimical terms with him and was out to implicate him falsely in such a serious case. What

is relevant to notice is that in this case, search was carried out in presence of the Medical Officer, who was a gazetted officer. A gazetted officer would not implicate the appellant falsely in such a serious case. The Medical Officer has testified before the Court that the search was carried out in the shop, which was in possession of the appellant, and the appellant was found physically present in the shop. This assertion made by the Medical Officer could not be demonstrated to be false during the course of his gruelling cross-examination. Therefore, the contention that the appellant was falsely implicated in the case and, therefore, the appeal should be allowed, cannot be accepted, and is hereby rejected.

9. The last contention that report of the analysis forwarded by the Forensic Science Laboratory does not indicate that the substances analysed were *ganja* and *charas* respectively within the meaning of the Act and, therefore, the appellant should be acquitted, has no substance. The record would show that after substances were found from the shop, proper samples were drawn. The sample so drawn were sealed as required by law. The procedure resorted to for sealing the samples was fool-proof and this becomes evident if one peruses the panchnama. The sealed *muddamal* was handed over to Senior Police Station Officer of Umbergaon Police Station, who,

in turn, handed over the *muddamal* for safe custody to Writer Head Constable Bhagwanbhai, who had delivered the *muddamal* to Forensic Science Laboratory for analysis. The report of the analysis indicates that the samples were received intact and no tampering had taken place. Thus, the substances, which were drawn from the quantity of *ganja* and *charas* found from the shop in possession of the appellant were ultimately analysed by the Forensic Science Laboratory and found to be *ganja* and *charas* within the meaning of the Act. Under the circumstances, the plea that the substances found were not *ganja* and *charas* within the meaning of the Act and, therefore, the appellant should be acquitted, is devoid of merits and is hereby rejected.

10. The abovereferredto three contentions are the only contentions, which were raised by the learned counsel of the appellant, for the consideration of this Court. No other point has been urged by the learned counsel of the appellant in support of the appeal. As this Court does not find merit in any of the contentions raised at the Bar, Criminal Appeal No.1044 of 2000 is liable to be dismissed.

11. As far as Criminal Appeal No.873 of 2000 filed

by the State Government under Section 377 of the Code for enhancement of sentence is concerned, this Court finds that cogent and convincing reasons have been recorded by the learned Judge of the trial Court for imposing minimum sentence prescribed under the Act. It is relevant to notice that the learned Judge has also imposed fine of Rs.2 Lakhs and in default of payment of fine, the learned Judge has imposed R.I. for two years. The record does not show that the appellant has paid up the fine. Therefore, over and above, R.I. for ten years, the appellant shall have to undergo R.I. for two years, which is imposed by the learned Judge of the trial Court in default of payment of fine. On the facts and in the circumstances of the case, it is difficult for this Court to conclude that the sentence imposed on the appellant is inadequate so as to enhance the same while exercising powers under Section 377 of the Code. Therefore, Criminal Appeal No.873 of 2000 is also liable to be dismissed.

12. As far as Criminal Appeal No.874 of 2000, which is filed by the State Government under Section 378 of the Code questioning the acquittal of the original accused No.2 is concerned, this Court finds that cogent and convincing reasons have been recorded by the learned Judge for acquitting the original accused No.2. It is well to remember that the secret information was received

by PI Mr.Mehta that the appellant in Criminal Appeal No.1044 of 2000 was dealing in contraband substances, but no information was received by him that the acquitted accused was also dealing in contraband substances. The learned Judge of the trial Court, who had advantage of observing demeanour of witnesses, has held that the prosecution has failed to prove its case beyond reasonable doubt against the acquitted accused. This is an acquittal appeal in which Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of the learned Judge who had opportunity to observe demeanour of the witnesses. As this Court is in general agreement with the view expressed by the learned Judge, the Court does not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the learned Judge and this Court is of the opinion that expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the case. This is so, in view of the decisions rendered by the Supreme Court in the cases of **(1) Girija Nandini Devi & Ors. v. Bijendra Narain Chaudhari, AIR 1967 SC 1124, and (2)**

State of Karnataka v. Hema Reddy and another, AIR 1981 SC 1417. On overall appreciation of evidence, this Court is satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondent-original accused No.2. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondent-original accused No.2. The learned Additional Public Prosecutor has failed to convince this Court to take a view contrary to the one already taken by the learned Judge and, therefore, Criminal Appeal No.874 of 2000 is also liable to be dismissed.

For the foregoing reasons, all the above-numbered three appeals fail and are dismissed. Muddamal to be disposed of in terms of directions given by the learned Judge in the judgment impugned in the appeals.

[J.M.PANCHAL,J.]

[H.B.ANTANI,J.]

Rajendra